15-233

IN THE

Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,
ALEJANDRO GARCÍA PADILLA,
as Governor of the Commonwealth of Puerto Rico,
and CÉSAR MIRANDA RODRÍGUEZ, as Secretary of
Justice of the Commonwealth of Puerto Rico,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Chapter 9 of the federal Bankruptcy Code, which does not apply to Puerto Rico, nonetheless preempts a Puerto Rico statute creating a mechanism for the Commonwealth's public utilities to restructure their debts.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, the Commonwealth of Puerto Rico, Alejandro García Padilla, as Governor of the Commonwealth of Puerto Rico, and César Miranda Rodríguez, as Secretary of Justice of the Commonwealth of Puerto Rico, were appellants in the First Circuit. In addition, Melba Acosta Febo and John Doe, as agents for the Government Development Bank of Puerto Rico, were appellants in the First Circuit.

Respondents, Franklin California Tax-Free Trust, Franklin New York Tax-Free Trust, Franklin Tax-Free Trust, Franklin Municipal Securities Trust, Franklin California Tax-Free Income Fund, Franklin New York Tax-Free Income Fund, Franklin Federal Tax-Free Income Fund, Oppenheimer Rochester Fund Municipals, Oppenheimer Municipal Fund, Oppenheimer Multi State Municipal Trust, Oppenheimer Rochester Ohio Municipal Fund, Oppenheimer Rochester Arizona Municipal Fund, Oppenheimer Rochester Virginia Municipal Fund, Oppenheimer Rochester Maryland Municipal Fund, Oppenheimer Rochester Limited Term California Municipal Fund, Oppenheimer Rochester California Municipal Fund, Rochester Portfolio Series, Oppenheimer Rochester Amt-Free Municipal Fund, Oppenheimer Rochester Amt-Free New York Municipal Fund, Oppenheimer Rochester Michigan Municipal Fund, Oppenheimer Rochester Massachusetts Municipal Fund, Oppenheimer Rochester North Carolina Municipal Fund, Oppenheimer Rochester Minnesota Municipal Fund, and BlueMountain Capital Management, LLC, for and on behalf of investment funds for which it acts

as investment manager, were appellees in the First Circuit.

The Puerto Rico Electric Power Authority (PREPA) was a defendant in the district court but was not a party to the proceedings in the First Circuit.

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INTRODUCTION

This case involves Puerto Rico's ability to respond to the most acute fiscal crisis in its history. The Commonwealth's three major public utilities, which provide electricity, water, and roads for its citizens, have a combined debt of some $20 billion, which they cannot pay. But neither can those utilities simply shut down the electricity, or the water, or the roads. The utilities thus need to restructure their debts in a way that is fair not only to their creditors but also to the people they serve.

The decision below, however, holds that Puerto Rico—unlike the fifty States—lacks access to *any* legal mechanism to restructure the debts of its public utilities. That decision reflects a fundamental misunderstanding not only of federal bankruptcy law but of federalism. It is undisputed that, since 1984, the federal Bankruptcy Code has precluded Puerto Rico from authorizing its "municipalities"—including, as relevant here, its public utilities—from restructuring their debts under Chapter 9 of the Code. But just because Puerto Rico's public utilities cannot restructure their debts under *federal* law does not mean that they cannot restructure their debts under *Commonwealth* law. Nothing in the federal Bankruptcy Code purports to leave a jurisdiction, like Puerto Rico, that is outside the scope of Chapter 9 in a "no man's land" where its public utilities cannot restructure their debts under *either* federal law *or* its own law.

To the contrary, it has been settled since the earliest days of the Republic that States and Territories have the power to enact their own restructuring laws. And it is equally settled that

entities excluded from the federal Bankruptcy Code—such as banks and insurance companies—are not thereby foreclosed from restructuring their debts under state or territorial law. There is thus no basis to conclude that the exclusion of Puerto Rico from Chapter 9 represents a limitation on the Commonwealth's power to create its own mechanism for restructuring the debts of its public utilities. Here, Puerto Rico exercised that power by enacting a statute—the Recovery Act—that creates such a restructuring mechanism.

The First Circuit, however, held below that Puerto Rico has the worst of both worlds: it is not entitled to the *benefits* of Chapter 9, but remains subject to the *burdens* of Chapter 9. In particular, the First Circuit held that 11 U.S.C. § 903(1)—a provision of Chapter 9 that sharply limits the ability of jurisdictions covered by that Chapter to restructure their debts outside of that Chapter—preempts the Recovery Act.

The court thereby turned Chapter 9 on its head. Section 903(1) is part and parcel of Chapter 9: on the one hand, Congress created a federal mechanism for municipalities to restructure their debts while, on the other, Congress limited their ability to restructure those debts through other means. It makes no sense to read a limitation on Chapter 9 to apply to a jurisdiction, like Puerto Rico, that is categorically excluded from that Chapter.

Indeed, it is anomalous in the extreme to think that Congress—*sub silentio* and through an amendment to a statutory definition—foreclosed Puerto Rico from access to *any* legal mechanism for restructuring the debts of its public utilities, which provide basic and essential services to its citizens.

Nor is it any answer to assert, as did the First Circuit, that Puerto Rico can always ask Congress to change the law: the question here is whether the law should be interpreted in such an unusual and draconian manner in the first place.

If Congress had wanted to leave Puerto Rico's public utilities, and the 3.5 million American citizens who depend on them, at the mercy of their creditors, it could hardly have chosen a more roundabout means of doing so. Section 903(1) is a proviso to a clause that does not apply to Puerto Rico, located within a chapter of the Bankruptcy Code that does not apply to Puerto Rico. Particularly in light of the background presumption against preemption—which this Court has long applied to Puerto Rico, and which is especially strong where, as here, preemption would create an untenable "no man's land" and impair Puerto Rico's fiscal management of its own household—it is neither necessary nor appropriate to interpret Section 903(1) to preempt the Recovery Act. Accordingly, this Court should reverse the judgment.

OPINIONS BELOW

The First Circuit's decision is reported at 805 F.3d 322, and reprinted in the Petition Appendix ("Pet. App.") at 1-68a. The district court's opinion is reported at 85 F. Supp. 3d 577, and reprinted at Pet. App. 69-137a.

JURISDICTION

The First Circuit issued its decision on July 6, 2015. Pet. App. 1-2a. Petitioners filed a timely petition for certiorari on August 21, 2015, which this Court granted on December 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

11 U.S.C. § 101. Definitions

* * *

(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

* * *

(52) The term "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.

* * *

11 U.S.C. § 109. Who may be a debtor

* * *

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (B) has negotiated in good faith with creditors and has failed to obtain

the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (C) is unable to negotiate with creditors because such negotiation is impracticable; or (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

* * *

11 U.S.C. § 903. Reservation of State power to control municipalities

This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—

(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and

(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

STATEMENT OF THE CASE

A. Background

This case arises out of the most acute fiscal crisis in Puerto Rico's history. *See* Recovery Act Stmt. of Motives, Pet. App. 139-40a. In recent years, the Commonwealth has faced an economic recession, high unemployment, and a declining population, all of which have contributed to a declining tax base and

decreased revenues. *Id.*, Pet. App. 147-48a. In January 2013, the Commonwealth's deficit for fiscal year 2012-13 was projected to exceed $2.2 billion. *Id.*, Pet. App. 139a. Even after significant budget cuts, the deficit for that fiscal year ultimately exceeded $1.2 billion. *Id.* And, despite additional fiscal discipline measures approved by the Legislative Assembly, the deficit for the 2013-14 fiscal year reached $650 million. *Id.* Under these circumstances, the Legislative Assembly declared a state of "fiscal emergency" in early 2014. *Id.*, Pet. App. 144-45a, 166a. Since then, the crisis has only deepened. *See generally* Working Group for the Fiscal & Economic Recovery of Puerto Rico, *Puerto Rico Fiscal & Economic Growth Plan* (Sept. 9, 2015), *available at* http://tinyurl.com/zyxragd (last visited Jan. 19, 2016); Working Group for the Fiscal & Economic Recovery of Puerto Rico, *Puerto Rico Fiscal & Economic Growth Plan: Update Presentation* (Jan. 18, 2016), *available at* http://tinyurl.com/z8yydhr (last visited Jan. 19, 2016).

The fiscal crisis has hit the Commonwealth's public utilities particularly hard. The combined deficit of the three main public utilities in fiscal year 2012-13 was approximately $800 million, and their overall combined debt reached $20 billion. Recovery Act Stmt. of Motives, Pet. App. 139-40a. For the first time in the Commonwealth's history, the principal rating agencies downgraded the Commonwealth's general obligation bonds (and the bonds of most of its public utilities) to below investment grade. *Id.*, Pet. App. 141a. The attendant increases in interest rates, along with the reduction in access to capital markets, have further limited these corporations' liquidity and financial flexibility. *Id.*, Pet. App. 141-42a.

Among the public corporations most acutely affected by the current fiscal crisis is the Puerto Rico Electric Power Authority (PREPA), which employs over 7,000 people and supplies virtually all of the Commonwealth's electric power. In recent years, PREPA has experienced severe reductions in its net revenues and has incurred net losses and cash flow shortfalls due to the prolonged weakness in the Commonwealth's macroeconomic conditions (high energy, labor, and maintenance costs) and investments in capital improvements. *Id.*, Pet. App. 145-46a. PREPA's utility rates, which are twice the average rate in the continental United States, have adversely affected the Commonwealth's economic development and stifled necessary capital investments. *Id.*, Pet. App. 146-47a.

When faced with similar crisis conditions, the fifty States may authorize their public utilities to restructure under Chapter 9 of the federal Bankruptcy Code. *See* 11 U.S.C. § 109(c), Pet. App. 274-75a. Puerto Rico, in sharp contrast, is categorically barred from authorizing its public utilities to restructure their debts under Chapter 9. *See* 11 U.S.C. § 101(52), Pet. App. 273a. Accordingly, the Commonwealth enacted the Recovery Act to allow its public utilities to restructure their debts in a fair and orderly manner. *See* Recovery Act Stmt. of Motives, Pet. App. 149-55a. As the Legislative Assembly explained:

> the current fiscal emergency situation requires legislation that allows public corporations, among other things, (i) to adjust their debts in the interest of all creditors affected thereby, (ii) provides

> procedures for the orderly enforcement and, if necessary, the restructuring of debt in a manner consistent with the Commonwealth Constitution and the U.S. Constitution, and (iii) maximizes returns to all stakeholders by providing them going concern value based on each obligor's capacity to pay.

Id., Pet. App. 154a. The Act thus creates a mechanism for Puerto Rico's public corporations to restructure their debts for the benefit of their creditors in the aggregate while continuing to provide essential public services like electricity and water. *Id.*; *see also id.*, Pet. App. 144a (Recovery Act will allow public corporations to continue to provide "services necessary and indispensable for the populace").

To that end, the Act establishes two types of procedures to address a public corporation's debt burden. The first, set forth in Chapter 2, is a market-based approach that contemplates limited court involvement. *See id.* Ch. 2, Pet. App. 157-60a (summary), 210-20a. Under this Chapter, a public corporation chooses debts to renegotiate with its creditors. *See id.* § 202(a), Pet. App. 211a. Creditors representing at least 50% of the debt in a given class must participate in the vote on whether to accept those changes, and at least 75% of participants must approve them. *See id.* § 202(d)(2)(A)-(B), Pet. App. 213a. Once Puerto Rico's Government Development Bank (GDB) and a specialized court established by the Act approve the consensual debt relief transaction, the instruments governing the creditors' claims are deemed amended to reflect the

renegotiated terms. *See id.* § 202(d), Pet. App. 212-13a; *id.* § 115(b), Pet. App. 187-88a.

The Act also allows Puerto Rico's public utilities to seek relief under Chapter 3, which involves enhanced judicial oversight and is modeled on Chapter 9 of the federal Bankruptcy Code. *Id.*, Pet. App. 160-64a (summary); Pet. App. 221-71a. To file under Chapter 3, a public utility files a petition that includes a list of affected creditors and a schedule of claims, which stays a broad range of actions against the petitioner. *See id.* §§ 301, 302, 304, Pet. App. 221-27a. Either the GDB or the petitioner must then file a proposed plan or proposed transfer of the utility's assets, which the court can confirm only if it "provides for every affected creditor in each class of affected debt to receive payments and/or property having a present value of at least the amount the affected debt in the class would have received if all creditors holding claims against the petitioner had been allowed to enforce them on the date the petition was filed." *Id.* §§ 310, 315(d), Pet. App. 234a, 238a. At least one class of affected debt must accept the plan with a majority of all votes cast and with the support of at least two-thirds of affected debt in the class. *See id.* §§ 312, 315(e), Pet. App. 235-36a, 238a. As under Chapter 2, all affected creditors are bound by the plan after it is approved by the specialized court. *See id.* § 115(b), Pet. App. 187-88a.

The Puerto Rico Legislative Assembly passed the Recovery Act on June 25, 2014, and the Governor signed it into law three days later.

B. Proceedings Below

On June 28, 2014—the very day the Governor signed the Recovery Act into law—the *Franklin*

respondents (mutual funds that hold PREPA bonds) filed a lawsuit challenging the Act's validity and seeking declaratory and injunctive relief. Several weeks later, the *BlueMountain* respondents (hedge funds that also hold PREPA bonds bought at a substantial discount) filed a similar lawsuit. The lawsuits alleged, among other things, that the Recovery Act is preempted by Section 903(1), a provision of Chapter 9 of the Bankruptcy Code.

In February 2015—without hearing oral argument—the district court (Besosa, J.) denied petitioners' motion to dismiss, granted summary judgment to the respondents who had requested it, and permanently enjoined petitioners from enforcing the Recovery Act. *See* Pet. App. 69-137a. As relevant here, the court agreed with respondents that the Act is preempted by Section 903(1), even though Puerto Rico cannot authorize its public utilities to restructure their debts under Chapter 9 in the first place. *See* Pet. App. 94-111a.[1]

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[1] Notwithstanding its conclusion that "Section 903(1) of the federal Bankruptcy Code preempts the Recovery Act," Pet. App. 111a, and its corresponding decision to "permanently enjoin[]" petitioners from enforcing the Act, Pet. App. 137a, the district court proceeded to address respondents' challenges to the Act under the Contract and Takings Clauses, Pet. App. 111-35a. The court concluded that respondents had stated claims upon which relief could be granted under those Clauses, and thus denied petitioners' motions to dismiss them. *See* Pet. App. 127a, 135-36a. Paradoxically, however, the court also recognized that its preemption ruling resolved the entire case, and thus entered final judgment in favor of the *Franklin* respondents, who had requested it. *See* Pet. App. 136-37a. Although the *BlueMountain* respondents had not similarly requested summary judgment, the district court's order in their

Petitioners appealed, but the First Circuit affirmed. *See* Pet. App. 1-68a. The panel majority agreed with the district court that Section 903(1) expressly preempts the Recovery Act, *see* Pet. App. 21-41a, and in addition held that the Act would frustrate the purpose of that provision, *see* Pet. App. 41-43a. Judge Torruella concurred in the judgment on preemption grounds, but opined that the exclusion of Puerto Rico from Chapter 9 is unconstitutional. *See* Pet. App. 46-68a.

The Commonwealth timely petitioned for a writ of certiorari, which this Court granted on December 4, 2015.

SUMMARY OF ARGUMENT

The Recovery Act represents a necessary and appropriate exercise of legislative authority by the Commonwealth of Puerto Rico to respond to an unprecedented fiscal crisis that threatens not only the Commonwealth's public utilities, but also the 3.5 million American citizens who depend on them for such basic services as electricity, water, and roads. The Recovery Act creates a legal mechanism for those public utilities to restructure their debts in a manner that is fair to the people they serve and to their creditors. The Act is not preempted by federal bankruptcy law; to the contrary, it fills a gap left by federal bankruptcy law.

At the broadest level, there is no merit to respondents' argument that the Bankruptcy Clause of the Federal Constitution, and the federal

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favor was also appealable in light of the grant of injunctive relief. *See* 28 U.S.C. § 1292(a)(1).

Bankruptcy Code enacted thereunder, preempt the entire field of state and territorial restructuring laws. To the contrary, since the earliest days of the Republic, States and Territories have passed such laws. Indeed, a federal bankruptcy law was in effect for only sixteen years during the first century under the Constitution. There is thus no "dormant Bankruptcy Clause" akin to the "dormant Commerce Clause." Nor does the federal Bankruptcy Code preempt the entire field of restructuring. Rather, this Court has long held that entities excluded from federal bankruptcy law—like banks and insurance companies—may restructure their debts under state law. And respondents' field preemption argument is particularly misplaced with respect to state or territorial *municipal* bankruptcy laws, which involve problems as peculiarly local as the fiscal management of a State or Territory's own household.

Although the First Circuit declined to endorse respondents' sweeping field preemption argument, it agreed with them that the Recovery Act is preempted by Section 903(1) of the federal Bankruptcy Code. But Section 903(1) is a proviso to a provision, Section 903, that does not apply to Puerto Rico, located in a chapter of the Code, Chapter 9, that does not apply to Puerto Rico. Section 903(1) simply specifies that Chapter 9 is the *exclusive* restructuring mechanism for entities within its scope. As a matter of law and logic, there is no basis to apply Section 903(1) to an entity, like Puerto Rico, that is categorically foreclosed from authorizing its municipalities to restructure their debts under Chapter 9.

At least two background presumptions also favor this commonsense interpretation of Section 903(1), and thereby preserve Puerto Rico's power to respond to an unprecedented fiscal crisis. *First*, this Court has recognized that the general presumption against preemption applies to Puerto Rico, and indeed the presumption applies with special force where, as here, (a) preemption would result in the creation of a "no man's land" immune from regulation under *either* federal *or* Commonwealth law, and (b) preemption would bar Puerto Rico from addressing a problem as peculiarly local as the fiscal management of its own household. *Second*, courts should avoid serious constitutional questions if they can, and Section 903(1) raises such questions because it sharply undercuts the reservation of state power that saved Chapter 9 from a federalism-based challenge in the first place.

There is no merit to the First Circuit's suggestion that Congress decided to foreclose Puerto Rico from authorizing its municipalities to seek Chapter 9 relief because it sought to retain such authority over those municipalities for itself. As an initial matter, there is no historical evidence for that suggestion; indeed, there is not one word of legislative history explaining Congress' decision to exclude Puerto Rico from Chapter 9. In any event, at least since the adoption of the Puerto Rico Constitution and the creation of the Commonwealth in 1952, Congress has never attempted to regulate the finances of Puerto Rico's municipalities, so it is fanciful to suggest that Congress sought to "retain" regulatory authority it has never exercised.

The First Circuit's conclusion that Congress intended to deny Puerto Rico the *benefits* of Chapter 9 while subjecting it to the *burdens* of Chapter 9 turns basic preemption principles upside down. If Congress had wanted Chapter 9 to be the sole method of restructuring municipal debt, even for jurisdictions categorically ineligible for Chapter 9 relief, it could and would have said so. As between the alternatives of allowing a restructuring regime or unleashing chaos, this Court can safely assume that Congress chose the former.

It follows that the First Circuit erred by holding that the Recovery Act is preempted by Section 903(1) of the Bankruptcy Code. Accordingly, this Court should reverse the judgment.

ARGUMENT

Chapter 9 Of The Federal Bankruptcy Code, Which Does Not Apply To Puerto Rico, Does Not Preempt The Recovery Act.

A. Neither The Bankruptcy Clause Nor The Federal Bankruptcy Code Preempts The Field of Municipal Bankruptcy Laws.

At the broadest level, respondents allege in their complaints—and have argued throughout this litigation—that both the Bankruptcy Clause of the federal Constitution and the federal Bankruptcy Code enacted thereunder preempt the entire *field* of restructuring. *See, e.g.*, *Franklin* 2d Am. Compl. [No. 14-1518 Dkt. 85] ¶ 59; *BlueMountain* Am. Compl. [No. 14-1569 Dkt. 20] ¶¶ 42-46; *Franklin* Opp. to Mot. to Dismiss [No. 14-1518 Dkt. 79], at 22 n.19; *Franklin* Opp. to Mot. to Dismiss [No. 14-1518 Dkt. 102], at 17-18; *Franklin* CA1 Br. (4/15/15) [No. 15-

1218], at 37-38; *BlueMountain* CA1 Br. (4/15/15) [No. 15-1221], at 23-24, 53-57; *Franklin* Cert. Opp. 26; *BlueMountain* Cert. Opp. 31-33. Under this view, the Recovery Act is preempted *regardless* of the presence, or indeed "the absence[,] of any federal law on the subject." *Franklin* Opp to Mot. to Dismiss [No. 14-1518 Dkt. 79], at 22 n.19. The First Circuit did not adopt this threshold argument, and for good reason: it reflects a fundamental misunderstanding of the preemptive scope of both the Bankruptcy Clause and the Bankruptcy Code.

The Bankruptcy Clause of the federal Constitution gives Congress "the power ... [t]o establish ... uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. From the earliest days of the Republic, this Court has recognized that this grant of power does not, by negative implication, prevent States and Territories from enacting their own laws governing the restructuring of debts. *See, e.g.*, *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 368 (1827); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193-97 (1819); *see generally* Stephen J. Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. 553, 563-68 (2014).

Indeed, there was no permanent federal bankruptcy law for most of the Nation's early history. *See, e.g.*, David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America*, at 3-4, 23-47 (2001); Peter Coleman, *Debtors & Creditors in America*, at 18-30 (1999). Rather, the practice was for Congress to enact a federal bankruptcy law in response to a financial downturn of national dimensions, and then repeal it after a few

years. *See* Skeel, *Debt's Dominion*, at 24-28; Charles Warren, *Bankruptcy in United States History*, at 9 (1935) ("[It] stand[s] out strikingly, in our history ... that every bankruptcy law has been the product of some financial crisis or business depression"). Thus, the first federal bankruptcy law was not enacted until 1800 and repealed three years later; the second was enacted in 1841 and repealed two years later; and the third was enacted in 1867 and repealed eleven years later. *See Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 184 (1902); *see generally* Skeel, *Debt's Dominion*, at 3-4, 23-47; Coleman, *Debtors & Creditors in America*, at 18-30.

During the first century under the Constitution, accordingly, a federal bankruptcy law was in effect for a total of only 16 years; it was not until 1898 that the precursor of the modern Bankruptcy Code was enacted. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, JA541-45 (excerpts). During that time, States and Territories routinely enacted their own bankruptcy legislation. *See, e.g.*, 1895 Cal. Stat., ch. 143, at 131 ("An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors"); 13 Idaho Terr. Sess. Laws, at 98 (1885) ("An Act for the Relief of Insolvent Debtors and the Protection of Creditors"); Nev. Rev. Stat. § 3845 (1881) ("An Act for the Relief of Insolvent Debtors and the Protection of Creditors"); 1 Statutes of the State of Ohio of a General Nature, ch. 57, at 456 (1854) ("Insolvent Debtors"); 1853 Conn. Pub. Acts 102 ("An Act for the Relief of Insolvent Debtors and for the More Equal Distribution of Their Effects Among Their Creditors"); General Law of Pennsylvania, ch. 456, at 710 (1836) ("An Act Relating to Insolvent Debtors");

Laws of the Territory of Michigan 333 (1827) ("An Act for the Relief of Insolvent Debtors"). Indeed, opponents of a federal bankruptcy law argued "that the State insolvent laws were sufficient to deal with the relations of creditor and debtor, and that there was no need of an exertion of National power." Warren, *Bankruptcy in United States History*, at 51. Their arguments were bolstered by the inconvenience and costliness of accessing far-flung federal courts. *Id.* at 19, 61; Skeel, *Debt's Dominion*, at 27-28.

Thus, contrary to respondents' suggestion, there is no "dormant Bankruptcy Clause" akin to the "dormant Commerce Clause" that precludes States or Territories from enacting restructuring legislation absent authorization by Congress. *See, e.g.*, Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. at 554 ("The plaintiffs' broad reading of the Bankruptcy Clause resurrects an argument that Daniel Webster made with no success in the early Nineteenth Century. Nearly two centuries of additional and contrary judicial precedent have since followed."); *id.* at 578 ("[T]he claim that the Act represents an obvious affront to the Constitution is not serious. There is no 'Dormant Bankruptcy Clause.'"); Coleman, *Debtors & Creditors in America*, at 35 (noting that this Court "quashed" the argument "that Congress had sole authority in the bankruptcy field").

It follows that state and territorial bankruptcy laws are "suspended only to the extent of actual *conflict* with the system provided by the Bankruptcy Act of Congress." *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (emphasis added). In other words, there

is no *field* preemption in this area. *See, e.g.*, *Sturges*, 17 U.S. (4 Wheat.) at 196 (under the Bankruptcy Clause, "the states are not forbidden to pass a bankrupt law"); *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp*, 302 U.S. 120, 125 (1937) ("While state laws in conflict with the laws of Congress on the subject of bankruptcies are suspended, they are suspended 'only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.'") (quoting *Stellwagen*, 245 U.S. at 613)).

That principle explains why this Court has long upheld state restructuring or liquidation laws applicable to entities—like banks or insurance companies—excluded from the scope of the federal Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 109(b), Pet. App. 273-74a (excluding banks and insurance companies from Chapter 7); *Neblett v. Carpenter*, 305 U.S. 297, 303-05 (1938) (upholding state statute governing rehabilitation of an insurance company); *Doty v. Love*, 295 U.S. 64, 70-74 (1935) (upholding state statute governing reorganization of a bank). Indeed, the vast majority of States and Territories have enacted their own restructuring regimes governing banks and insurance companies. *See, e.g.*, La. Stat. Ann. §§ 6:391 to 6:401 (banks); Nev. Rev. Stat. §§ 667.035 to 667.205 (banks); S.D. Codified Laws §§ 51A-15-1 to 51A-15-45 (banks); Guam Code Ann. §§ 106401-404 (banks); Conn. Gen. Stat. §§ 38a-903 to 38a-965 (insurance companies); Idaho Code §§ 41-3301 to 41-3360 (insurance companies); Mont. Code Ann. §§ 33-2-1301 to 33-2-1394 (insurance companies); V.I. Code Ann. tit. 22, §§ 1251-86 (insurance companies). The background rule, thus, is not that an entity excluded from the federal

Bankruptcy Code is consigned to a "no man's land" in which it cannot restructure its debts under *either* federal *or* state law. To the contrary, the background rule is that States and Territories may fill in gaps left by the federal Bankruptcy Code, at least insofar as their laws do not conflict with the Code. *See, e.g.*, *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 552 (7th Cir. 1985); *In re Bankers Trust Co.*, 566 F.2d 1281, 1288 (5th Cir. 1978); *Israel-British Bank (London) Ltd. v. FDIC*, 536 F.2d 509, 514 (2d Cir. 1976); *In re Equity Funding Corp. of Am.*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975).

Respondents' field preemption argument is particularly misplaced in the context of the restructuring of the debts of a State's *own* public corporations, agencies, and instrumentalities. It was not until 1934 that Congress first attempted to extend the federal Bankruptcy Code to encompass such entities in the first place. *See* Act of May 24, 1934, ch. 345, 48 Stat. 798. And that attempt proved unavailing: in light of the background principles of federalism reflected in the Tenth Amendment, this Court invalidated the law as exceeding Congress' constitutional power over bankruptcy. *See Ashton v. Cameron Cty. Water Imp. Dist. No. 1*, 298 U.S. 513, 529-32 (1936). Were the 1934 Act permitted to stand, the Court declared, States would be "no longer free to manage their own affairs," and "the sovereignty of the state, so often declared necessary to the federal system, [would] not exist." *Id.* at 531.

Thus, it was not until 1938 that this Court first upheld federal bankruptcy legislation governing state public corporations, agencies, and instrumentalities. *See United States v. Bekins*, 304

U.S. 27, 51-52 (1938). And even then, the Court did not overrule its earlier precedents, but simply held that the statute in question (a precursor to Chapter 9) was "carefully drawn so as not to impinge on the sovereignty of the State." *Id.* at 50-51. The Court emphasized that the redrawn statute allowed "[t]he State [to] retain[] control of its fiscal affairs" by permitting municipal restructuring under federal law "only in a case where [the federal restructuring] is authorized by state law." *Id.* at 51; *see generally* 11 U.S.C. § 903, Pet. App. 279a ("This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise.").

Accordingly, this Court's validation of federal municipal bankruptcy law in *Bekins* by no means suggested that the federal statute did (or constitutionally could) preempt the entire field of municipal restructuring. Indeed, Section 903 underscores that Chapter 9 does *not* preempt that entire field. And this Court rejected that sweeping field-preemption argument just four years after *Bekins* in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942). In that case, a New Jersey municipal bankruptcy law was challenged as preempted by the precursor to Chapter 9. *See id.* at 507. This Court readily turned aside that challenge. As the Court explained, "[n]ot until April 25, 1938, was the power of Congress to afford relief similar to that given by New Jersey for its municipalities clearly established." *Id.* at 508 (citing the date on which the Court in *Bekins* upheld the municipal restructuring provisions of the federal Bankruptcy

Code against a constitutional challenge). The court continued:

> Can it be that a power that was not recognized until 1938, and when so recognized, was carefully circumscribed to reserve full freedom to the states, has now been completely absorbed by the federal government—that a state which ... has ... devised elaborate machinery for the autonomous regulation of problems as peculiarly local as the fiscal management of its own household, is powerless in this field? We think not.

Id. at 508-09. It is hard to imagine a more emphatic repudiation of respondents' field-preemption argument. Particularly in the context of municipal bankruptcy, Congress—not the States or Territories—is the interloper, and the enactment of Chapter 9 by no means ousts States and Territories from the field.

Indeed, the Trust Agreement under which respondents purchased their PREPA bonds specifically recognizes the possibility of a Commonwealth restructuring law: An "event of default" occurs when, among other things, PREPA institutes a proceeding "for the purpose of effecting a composition between [PREPA] and its creditors or for the purpose of adjusting the claims of such creditors pursuant to any federal *or Commonwealth* statute now or hereafter enacted." Trust Agreement § 802(g), JA622 (emphasis added). Needless to say, the parties hardly would have contemplated the possibility of a "Commonwealth statute" in a field completely preempted by federal law. In short,

respondents' field-preemption argument is insubstantial. *Cf.* Caleb E. Nelson, *Preemption*, 86 Va. L. Rev. 225, 227-28 & n.12 (2000) ("The Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.").

B. Section 903(1) Does Not Preempt The Recovery Act.

Above and beyond their sweeping field-preemption argument, respondents allege in their complaints—and have argued throughout this litigation—that the Recovery Act conflicts with, and is thus preempted by, a specific provision of the federal Bankruptcy Code: Section 903(1) of Chapter 9. *See, e.g.*, *Franklin* 2d Am. Compl. [No. 14-1518 Dkt. 85] ¶¶ 28-29, 59; *BlueMountain* Am. Compl. [No. 14-1569 Dkt. 20] ¶ 49; *Franklin* CA1 Br. (4/15/15) [No. 15-1218], at 21-45; *BlueMountain* CA1 Br. (4/15/15) [No. 15-1221], at 26-52; *Franklin* Cert. Opp. 1-2, 12-25; *BlueMountain* Cert. Opp. 5-7, 17-29. Under this view, the 1984 amendment to the Bankruptcy Code leaves Puerto Rico unable to access the *benefits* of Chapter 9, but subject to the *burdens* of that Chapter. The First Circuit agreed with them on this score, holding not only that Section 903(1) expressly preempts the Recovery Act, *see* Pet. App. 21-41a, but also that the Recovery Act would frustrate the purpose of that provision, *see* Pet. App. 41-43a. The First Circuit thereby erred.

1. By Its Plain Terms, Section 903(1) Does Not Apply To Puerto Rico.

According to the First Circuit, Section 903(1), "by its plain language, bars a state law like the Recovery Act." Pet. App. 22a. In that court's view, "[t]here is no disputing that the Recovery Act is a 'law

prescribing a method of composition of indebtedness' of eligible Puerto Rico municipalities that may 'bind' said municipalities' creditors without those creditors' 'consent.'" Pet. App. 23a (quoting 11 U.S.C. § 903(1), Pet. App. 279a). "And, because 'State' is defined to include Puerto Rico under § 101(52), the Recovery Act is a 'State law' that does so." *Id.* Thus, the First Circuit declared, "we hold that the Recovery Act is preempted." *Id.*

But that "textual" analysis misses the mark. Statutory provisions do not exist in a vacuum, and courts do not construe them in a vacuum. To the contrary, courts construe statutes "'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000)). "Our duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). This is hardly a novel or controversial proposition. *See id.* at 2497 (Scalia, J., joined by Thomas & Alito, JJ., dissenting) ("I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters."); *see also Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); *Richards v. United States*, 369 U.S. 1, 11 (1962).

In context, it is clear that Section 903(1) does not apply to Puerto Rico. Section 903(1) is not a standalone provision of the U.S. Code. Rather, it is a proviso to a clause—Section 903—that does not apply to Puerto Rico, located within a chapter of the

Bankruptcy Code—Chapter 9—that does not apply to Puerto Rico. Once Section 903(1) is construed in its statutory context, there is no basis to apply that provision here.

The whole point of Chapter 9 of the Bankruptcy Code is to create a mechanism for a municipality—*i.e.*, a "political subdivision or public agency or instrumentality of a State," 11 U.S.C. § 101(40), Pet. App. 272a—to restructure its debts under federal law. Every section of that Chapter works in service to that end. *See* 11 U.S.C. §§ 901-46; Alan N. Resnick & Henry J. Sommer eds., 6 *Collier on Bankruptcy* § 900.01 (16th ed. 2014) ("Chapter 9 of the Bankruptcy Code is directed toward a reorganization of a municipality's financial affairs.").

Section 903 is no exception. As its title underscores, that provision "[r]eserve[s] ... State power to control municipalities," 11 U.S.C. § 903, Pet. App. 279a, that might otherwise be compromised by Chapter 9. *Cf. Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (plurality) (looking to title to clarify scope of statutory provision); *id.* at 1090 (Alito, J., concurring in the judgment) (same). Section 903 thus promotes the values of federalism on which our entire constitutional structure is based, preventing Chapter 9 from intruding into a core area of state autonomy and thereby running afoul of the Tenth Amendment. *See Bekins*, 304 U.S. at 50-52; *Ashton*, 298 U.S. at 528; *cf.* 6 *Collier on Bankruptcy* § 903.01 ("Section 903 is the constitutional mooring for Bankruptcy Code chapter 9 as it embodies a statutory declaration that the enactment of municipal bankruptcy law ... does not limit or impair the rights reserved to the

States pursuant to the Tenth Amendment."). Needless to say, Section 903 has no legal or logical application to a jurisdiction, like Puerto Rico, that is categorically ineligible to authorize its municipalities to seek relief under Chapter 9 in the first place.

By its terms, Section 903 specifies that "*[t]his Chapter* [*i.e.*, Chapter 9] does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise." 11 U.S.C. § 903, Pet. App. 279a (emphasis added). But Chapter 9 cannot "limit or impair" the power of a jurisdiction to which it is categorically inapplicable. *Id.* Because Section 903 simply negates an inference that cannot apply to Puerto Rico, Section 903 does not apply to Puerto Rico: it would be nonsensical for Congress to provide Puerto Rico with a shield against intrusion by a Chapter that, by definition, can have no effect on Puerto Rico. The First Circuit was unable to identify any way in which Section 903, or indeed Chapter 9, applies to Puerto Rico.

And Section 903(1), by its plain terms, is nothing more than a proviso to Section 903. Section 903(1) limits the general reservation of power set forth in Section 903 by specifying that, notwithstanding that reservation, "a State law prescribing a method of composition of indebtedness of [a] municipality may not bind any creditor that does not consent to such composition." 11 U.S.C. § 903(1), Pet. App. 279a. Thus, if Section 903 does not apply to Puerto Rico, it follows that Section 903(1) does not apply to Puerto Rico either. *See, e.g.*, *United States v. Morrow*, 266

U.S. 531, 534-35 (1925) ("[A proviso's] grammatical and logical scope is confined to the subject-matter of the principal clause."); *id.* at 535 ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); *Abbott v. United States*, 562 U.S. 8, 28 (2010) ("As a proviso attached to § 924(c), the 'except' clause is most naturally read to refer to the conduct § 924(c) proscribes.").

Section 903(1), in short, "does not exist in a vacuum," but "is part of, and in fact an *exception* to, the main point of a longer sentence." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 433 (6th Cir. 2014) (*en banc*; *per curiam*) (McKeague, J., joined by Batchelder, C.J., concurring) (emphasis in original); *see also* Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, & A Reconsideration of Chapter 9*, 85 Am. Bankr. L.J. 363, 379 n.84 (2011) ("[Section 903(1)] appears as an exception to § 903's respect for state law in chapter 9 and thus appears to apply only in a chapter 9 bankruptcy."). Indeed, Section 903(1) includes a textual reference ("such municipality") back to Section 903, thereby underscoring that the two provisions not only *may* but *must* be read in tandem. 11 U.S.C. § 903(1), Pet. App. 279a. The First Circuit was unable to explain how Section 903(1) applies to Puerto Rico when Section 903 does not.

Because there is no question that Puerto Rico is categorically ineligible to authorize its municipalities to restructure their debts under Chapter 9, *see* 11 U.S.C. § 101(52), Pet. App. 273a; *id.* § 101(40), Pet. App. 272a; *id.* § 109(c), Pet. App. 274-75a, there is no basis to apply Section 903(1), which is concededly

part of Chapter 9, to Puerto Rico. That result comports not only with the text of the statute, but also with common sense. Chapter 9 offers States—but not Puerto Rico—the *option* of allowing their municipalities to seek federal bankruptcy protection. In exchange for providing that federal option, Congress limited the relief that States could provide those municipalities under their own laws. *See id.* § 903(1), App. 279a. In other words, Congress required States to take the bitter with the sweet. There is nothing in the text, structure, or history of the statute to suggest that Congress required Puerto Rico to take *only* the bitter without the sweet: a limitation on the relief it can provide municipalities under its own law *without* the option of authorizing those municipalities to restructure their debts under federal law. And it would be exceedingly strange for Congress to bind Puerto Rico through an exception to a rule that does not itself govern Puerto Rico and is contained in a Chapter that does not apply to Puerto Rico. If, as respondents insist, "Congress wanted Chapter 9 to be the sole method of restructuring municipal debt," *Franklin* CA1 Br. (4/15/15) [No. 15-1218], at 2, even for jurisdictions categorically ineligible for Chapter 9 relief, it could and would simply have said so.

2. Background Legal Presumptions Underscore That Section 903(1) Does Not Apply To Puerto Rico.

Even if there were any doubt as to whether Section 903(1) applies to Puerto Rico as a plain textual matter, any such doubt is erased by the application of two background presumptions: (1) the general presumption against federal preemption of

state law, which is especially strong where, as here, such preemption (a) would create a "no man's land" governed by *neither* federal *nor* state law, and (b) would oust state law from matters as peculiarly local as the fiscal management of the State's own household; and (2) the presumption against construing statutes to raise serious constitutional questions. These presumptions are addressed in turn below.

a. Presumption Against Preemption

A basic tenet of our federal system is that the Constitution authorizes Congress to legislate in specific fields, *see* U.S. Const. art. I, but generally leaves the States free to legislate as they see fit, *see id.* amend. X. Thus, "[i]t has long been settled ... that we presume federal statutes do not ... preempt state law." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Although Puerto Rico is not a State, this Court has long "agree[d]" that "the test for federal preemption of the law of Puerto Rico ... is the same as the test under the Supremacy Clause." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

(1) Presumption Against Creation Of A "No Man's Land"

A corollary to the general presumption against preemption is that this Court does not lightly impute to Congress an intent to preempt state law in an area that Congress itself has not occupied, *i.e.*, the Court presumes that Congress does not intend to create a "no man's land" immune from regulation under *either* federal *or* state law. *See, e.g., United*

States v. Idaho ex rel. Director, Idaho Dep't of Water Resources, 508 U.S. 1, 7 (1993) (refusing to interpret federal statute to preempt "established state-law rules governing pleading, discovery, and the admissibility of evidence at trial," because "we do not believe that Congress intended to create such a legal no man's land ...."); *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 199-207 (1978) (refusing to interpret federal labor law to preempt state trespass law where such preemption could create a no man's land governed by neither federal nor state law); *see id.* at 208 (Blackmun, J., concurring); *id.* at 212 (Powell, J., concurring); *FPC v. Louisiana Light & Power Co.*, 406 U.S. 621, 631 (1972) ("[W]hen a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created.") (internal quotation omitted); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 431-32 (1963) (refusing to interpret federal telecommunications law to preempt state law regulating radio advertising where such preemption could lead to a no man's land governed by neither federal nor state law); *id.* at 446 (Brennan, J., concurring) (underscoring that such preemption could "produce a 'no-man's-land' in which there would be at best selective policing of the various advertising abuses and excesses which are now very extensively regulated by state law"). The law, like nature, abhors a vacuum, and Congress should not lightly be deemed to have created one.

That principle applies here with full force. As noted above, there is no dispute that Congress in

1984 precluded Puerto Rico from authorizing its public corporations to restructure their debts under federal law. The question, thus, is whether Congress thereby (1) left Puerto Rico free to enact its own mechanism for its public corporations to restructure their debts (subject, of course, to relevant federal constitutional constraints), or (2) barred Puerto Rico from access to *any* legal mechanism for its public corporations to restructure their debts, leaving them, the people they serve, and their creditors collectively at the mercy of any particular creditor or creditors. The latter interpretation is simply not reasonable, at least in the absence of far clearer evidence of congressional intent. This Court should not lightly impute to Congress the decision to treat Puerto Rico and its 3.5 million American citizens in such a cavalier manner.

Indeed, the presumption against the creation of a no man's land is especially powerful in the bankruptcy context. The first and principal objective of "[a]ll bankruptcy law, ... no matter when or where devised and enacted," is "to secure an equitable division of the insolvent debtor's property among all his creditors"—in other words, to protect "the creditors ... from one another." Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. Pa. L. Rev. 223, 225 (1918); *see also* Thomas H. Jackson, *The Logic & Limits of Bankruptcy Law*, at 10 (2001) ("The basic problem that bankruptcy law is designed to handle, both as a normative matter and as a positive matter, is that the system of individual creditor remedies may be bad for the creditors *as a group* when there are not enough assets to go around.") (emphasis in original). In the absence of a restructuring regime, consensual reorganization is

unlikely; individual creditors have every incentive to "hold out" on any prospective agreement in an effort to obtain more favorable terms, even though creditors as a whole may have an interest in working out a restructuring plan that would enhance their collective recovery. *See generally* Pet. App. 10a n.6. Accordingly, the alternative to a fair and orderly restructuring of debt is a mad dash to collect among creditors, in which some creditors may recover everything while others recover nothing.

The well-heeled respondents in this case may have everything to gain from such a "Wild West" regime, *see* Jonathan Mahler & Nicholas Confessore, *Inside the Billion-Dollar Battle for Puerto Rico's Future*, N.Y. Times, Dec. 19, 2015, *available at* http://tinyurl.com/j4ruluz (last visited Jan. 19, 2016), but certainly the other creditors of Puerto Rico's public utilities—who are unlikely to win a "race to the courthouse" against respondents—do not. For Congress to leave Puerto Rico's public utilities without any legal means to restructure their debts is not only to leave them (and the people they serve) at the mercy of their creditors, but to leave weaker creditors at the mercy of more powerful creditors in a chaotic free-for-all. *See generally Faitoute*, 316 U.S. at 510 ("A policy of every man for himself is destructive of the potential resources upon which rests the taxing power which in actual fact constitutes the security for unsecured obligations outstanding against a [municipality]."); Douglas G. Baird, *Bankruptcy Procedure & State-Created Rights: The Lessons of* Gibbons *and* Marathon, 1982 Sup. Ct. Rev. 25, 35 (1982) ("Creditors collectively benefit more from having a single proceeding in which the debtor's assets can be assembled and

divided up in an efficient and orderly way than from racing each other to the courthouse to divide the debtor's assets piecemeal").

It is implausible to suppose that Congress intended to invite such anarchy by simply amending, in the context of a 60-page bill, a definitional section of the Bankruptcy Code to prevent Puerto Rico from authorizing its public agencies and instrumentalities to seek Chapter 9 relief. *See* Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(j)(6), 98 Stat. 333 (1984), *available at* http://tinyurl.com/h23csof (last visited Jan. 19, 2016); *see also* JA604. Puerto Rico's public corporations provide vital public services, including electricity, water, and roads, to the Commonwealth's citizens. While Congress certainly has the *power* to create a no man's land, *see, e.g.*, *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10-11 (1957), this Court should not lightly assume that it has done so, especially in this critical area. As one commentator has put it, "there seems to be no good reason why [the exclusion of Puerto Rico from Chapter 9] should leave Puerto Rico entirely helpless to address the plight of its public corporations. ... The bondholders are entitled to insist that that every effort be made to honor their contracts, but the citizens of Puerto Rico are also entitled to receive the basic services, like electricity, provided by these entities." Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. at 578.

The First Circuit emphatically denied, however, that its interpretation of the statute creates a "no man's land." *See* Pet. App. 28-29a & n.24. According to that court, "congressional retention of authority is

not the same as a no man's land," because "Puerto Rico may turn to Congress for recourse." Pet. App. 5a, 29a n.24. But Congress' power to *free* Puerto Rico from a "no man's land" does not negate the existence of such a "no man's land" in the first place: the point remains that, absent some future Act of Congress, the decision below currently leaves Puerto Rico powerless to authorize its public utilities to restructure their debts under *any* law.

Nor is there any support for the First Circuit's suggestion that "Congress preserved to itself th[e] power to authorize Puerto Rican municipalities to seek Chapter 9 relief." Pet. App. 5a. In particular, the First Circuit speculated that "[i]f Puerto Rico could determine the availability of Chapter 9 for Puerto Rico municipalities, that might undermine Congress's ability to do so." Pet. App. 29a; *see also id.* ("Congress's ability to exercise such other options would also be undermined if Puerto Rico could fashion its own municipal bankruptcy relief."). But construing existing federal law to allow Puerto Rico to enact its own municipal-bankruptcy law would in no way limit any power of Congress; no one denies that Congress could preempt the Recovery Act if it clearly expressed an intent to do so. The issue here is not one of congressional *power*, but of congressional *intent*.

In any event, as Judge Torruella bluntly put it, the panel majority's suggestion that Congress sought to preserve for itself the power over Puerto Rico's municipalities that States retain over their own municipalities is "pure fiction" without any basis in fact or law. Pet. App. 53a. "There is absolutely nothing in the record of the 1984 Amendments to

justify" such speculation regarding congressional intent. *Id.* Indeed, that speculation reveals a basic misunderstanding of Puerto Rico's political status. Since the adoption of the Puerto Rico Constitution and the establishment of the Commonwealth in 1952, Congress has played no role whatsoever in the enactment of Puerto Rico's laws; those laws are not submitted to Congress for review, and there is no legal mechanism for Congress to block them or otherwise unilaterally interfere with the Commonwealth's authority over its municipalities under Commonwealth law (and Congress has never attempted to do so). *See generally* United States of Am., *Memorandum Concerning the Cessation of Information Under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico*, 28 Dept. of State Bull. 584, 586-87 (Apr. 20, 1953), *available at* http://tinyurl.com/hngyaw2 (last visited Jan. 19, 2016). Against this legal backdrop, it is especially implausible to suggest that Congress sought through the 1984 Amendment to "retain" authority over Puerto Rico's public utilities that it has never exercised.[2]

Nor is it true, as respondents have asserted, that this "supposed 'no-man's land' turns out to be crowded with good company." *BlueMountain* CA1

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[2] The First Circuit's observation that "Puerto Rico is presently seeking authorization or other relief directly from Congress," Pet. App. 5a, is similarly unavailing. Puerto Rico would certainly welcome federal legislation ending its exclusion from Chapter 9, and is seeking such legislation—over respondents' furious opposition. *See* Reply to Br. in Opp., No. 15-233 (11/9/15), at 8-9. But these ongoing efforts to amend Chapter 9 shed no light on that provision's current preemptive effect.

Br. (4/15/15) [No. 15-1221], at 4; *see also id.* at 23, 50; *Franklin* CA1 Br. (4/15/15) [No. 15-1218], at 2. Such "company," according to respondents, consists of municipalities that have not been specifically authorized by their States to seek relief under Chapter 9. *See Franklin* CA1 Br. (4/15/15) [No. 15-1218], at 2; *BlueMountain* CA1 Br. (4/15/15) [No. 15-1221], at 4, 23, 50. But those other municipalities do not inhabit a "no man's land" at all. Unlike Puerto Rico's municipalities, Congress has not rendered them categorically ineligible to seek Chapter 9 bankruptcy protection; rather, their States simply have not yet exercised the *option* of specifically authorizing them to seek such relief—perhaps because they have not yet had any need to do so. Thus, for example, the Governor of Michigan authorized the City of Detroit to seek protection under Chapter 9 on July 18, 2013, and the City filed its bankruptcy petition on the same day. *See* Gov. Rick Snyder, *Authorization to Commence Chapter 9 Bankruptcy* (July 18, 2013), *available at* http://tinyurl.com/zvb92s2 (last visited Jan. 19, 2016).) No State can find itself in the no man's land to which the decision below relegates Puerto Rico, where the Commonwealth cannot authorize its public corporations, agencies, and instrumentalities to restructure their debts under *either* federal *or* state law.

(2) Presumption Against Interference With Fiscal Management Of A State's Own Household

"Closely related" to the general presumption against preemption "is the well-established principle

that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 134 S. Ct. at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (further internal quotation omitted). Thus, "if the Federal Government would 'radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit' about it." *Id.* (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)) (further internal quotation omitted).

This principle applies here with full force. As this Court has recognized, the presumption against preemption is heightened with respect to "problems as peculiarly local as the fiscal management of [a State's] own household." *Faitoute*, 316 U.S. at 509. Indeed, this Court upheld the constitutionality of Chapter 9 only after ensuring that it allowed the States to "retain[] control of [their] fiscal affairs." *Bekins*, 304 U.S. at 51; *see also Ashton*, 298 U.S. at 529-32 (invalidating prior version of Chapter 9 on federalism grounds); *Faitoute*, 316 U.S. at 508-09 (emphasizing that *Bekins* upheld Chapter 9 against a federalism-based constitutional challenge only because the statute "was carefully circumscribed to reserve full freedom to the states"); *id.* at 512 ("The intervention of the State in the fiscal affairs of its cities is plainly an exercise of its essential reserve power to protect the vital interests of its people by sustaining the public credit and maintaining local government.").

Remarkably, the First Circuit declared that the presumption against preemption is "weak, if present

at all," in this context. Pet. App. 36a. But that gets the law precisely backwards. A state law governing the debts of the State's *own* public corporations, agencies, and instrumentalities "goes beyond an area traditionally regulated by the States," and involves a State's organization of its own internal affairs. *Gregory*, 501 U.S. at 460. Because "[c]ongressional interference" with such a law "would upset the usual constitutional balance of federal and state powers ... 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). In such "traditionally sensitive areas," federal courts will not find preemption absent a "'clear statement ... that [Congress] has in fact faced, and intended to [preempt],'" the state law at issue. *Id.* at 461 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).

No such clear statement is present here. Rather, as discussed above, the First Circuit based its decision on the premise that Chapter 9—which does not apply to Puerto Rico in the first place—nevertheless preempts Puerto Rico's municipal restructuring statute. Certainly, if Congress wished to preclude Puerto Rico from addressing "problems as peculiarly local as the fiscal management of its own household," *Faitoute*, 316 U.S. at 509, it could and would have said so directly, not through a proviso to a clause that does not apply to Puerto Rico located within a chapter of the Bankruptcy Code that does not apply to Puerto Rico. This Court has formulated "clear statement" rules like the one in *Gregory* to prevent precisely such startling deviations from our federal structure without

ensuring that Congress gave careful consideration to the matter. *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation") (internal quotation omitted).

b. Presumption Against Raising Serious Constitutional Questions

Finally, the venerable doctrine of constitutional avoidance also counsels against construing Section 903(1) to apply here: this Court should construe the statute in a way that allows it to avoid, if possible, "grave and doubtful constitutional questions." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal quotation omitted); *see generally Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The constitutional problem lurking here, which this Court would have to confront if it holds that Section 903(1) governs this case, involves that provision itself. As explained above, this Court originally invalidated Chapter 9 on Tenth Amendment grounds, *see Ashton*, 298 U.S. at 529-32, and ultimately upheld the statute only after ensuring that, as amended, it left the States complete "control of [their] fiscal affairs," *Bekins*, 304 U.S. at 51; *see generally Faitoute*, 316 U.S. at 508-09 (emphasizing that this Court upheld Chapter 9 only after ensuring that it "was carefully circumscribed to reserve *full freedom* to the states") (emphasis added).

Section 903(1), however, takes away the "full freedom," *id.*, on which the constitutionality of Chapter 9 is premised. Rather, for entities within its scope, it purports to establish the *sole* mechanism for

a non-consensual restructuring of municipal debt. *See* 11 U.S.C. § 903(1), Pet. App. 279a ("[A] State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition."). In other words, Section 903(1) cuts back on the reservation of state power set forth in Section 903—the very reservation of state power that saved Chapter 9 from unconstitutionality. In the 70 years that Section 903(1) has been on the books, this Court has never addressed its constitutionality.

But that lurking constitutional problem has by no means escaped notice. To the contrary, as the leading bankruptcy treatise notes, "[i]f a state composition procedure does not run afoul of the contracts clause, then municipal financial adjustment under a state procedure should be a permissible exercise of state power, and a congressional enactment prohibiting that exercise would be congressional overreaching in violation of the Tenth Amendment." 6 *Collier on Bankruptcy* § 903.03[2].[3] Other prominent commentators agree.

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[3] As noted above, respondents also brought claims under the Contract Clause, U.S. Const. art. I, § 10, cl. 1, and the Takings Clause, U.S. Const. amend. V, and the district court declined to dismiss those claims on the pleadings, *see* Pet. App. 111-35a. Because the district court resolved the case on preemption grounds, and the First Circuit affirmed, no claim under the Contract or Takings Clause is now pending before this Court. If this Court were to reverse the judgment, respondents would be free to pursue their Contract and Takings Clause claims on remand—although, as a matter of basic procedural regularity, this Court should vacate the district court's discussion of those claims, which was wholly gratuitous in light of the district court's case-dispositive preemption ruling. *See, e.g., Lyng v.*

See, e.g., Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. Chi. L. Rev. 425, 454 n.127 (1993) (noting that Section 903(1) "is far more questionable on federalism grounds than was the 1933 Act [invalidated in *Ashton*]"); Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. at 571 ("Compelling states to use chapter 9—by precluding all other options—would seem to undermine the very essence of the power balance that lies at the heart of the Tenth Amendment.").

Similarly, the lower courts have flagged this serious constitutional issue. *See Ropico, Inc. v. City of New York*, 425 F. Supp. 970, 983-84 (S.D.N.Y. 1976) ("A federal court decision that the federal Bankruptcy Act precludes the New York State legislature from implementing [an] emergency measure aimed at dealing with a fiscal crisis of unprecedented proportions affecting its largest city would raise very serious questions about the right of

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Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 446 (1988) ("Were we persuaded that [the lower courts' constitutional] holdings were unnecessary, we could simply vacate the relevant portions of the judgment below."). Once the district court concluded that the Act in its entirety was preempted, and permanently enjoined petitioners from enforcing it, it was neither necessary nor appropriate for the court to embark on a frolic and detour through the Contract and Takings Clauses, and its unnecessary—and controversial—pronouncements on those Clauses thus violate the "fundamental and longstanding principle of judicial restraint ... that courts avoid reaching constitutional questions in advance of the necessity of deciding them," *id.* at 445, and the related rule against rendering "advisory opinions," *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947).

a state effectively to govern its political subdivisions."); *cf. City of Pontiac*, 751 F.3d at 433 (remanding for district court to determine "whether, under § 903(1) of the Bankruptcy Code, [the challenged state law] ... prescribes a method of composition of indebtedness that binds [creditors] without their consent *and, if so, whether principles of state sovereignty preclude application of § 903(1) in this case*") (emphasis added).

The First Circuit sought to sidestep this constitutional issue while applying Section 903(1) by asserting that "[t]he limits of the Tenth Amendment do not apply to Puerto Rico," because it is not a State. Pet. App. 44a. But that assertion misses the point. Petitioners are not arguing here that Puerto Rico is a State protected by the Tenth Amendment. Rather, petitioners are simply noting that this Court need not, and should not, apply Section 903(1) if possible to avoid it, because doing so would require the Court to apply a provision whose constitutionality is, at a minimum, subject to serious doubt, without considering or applying a potential saving construction. Respondents' argument, after all, is that Section 903(1) preempts municipal bankruptcy laws enacted by any of the fifty States *as well as* Puerto Rico. The canon of constitutional avoidance thus applies here regardless of Puerto Rico's constitutional status: if one of "two plausible statutory constructions" would require a court to interpret a statute in a way that gives rise to constitutional problems, "the other should prevail—*whether or not those constitutional problems pertain to the particular litigant before the Court.*" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (emphasis added). This Court should not apply Section 903(1)

for the first time in this case while blinding itself (as did the First Circuit) to the dubious constitutionality of that provision. Because Section 903(1) does not purport to apply to jurisdictions, like Puerto Rico, that Congress has rendered categorically ineligible for Chapter 9 relief, there is no reason for this Court to interpret that provision to do so.

3. The First Circuit's Contrary Positions Are Unavailing.

a. The First Circuit's Critique Of Petitioners' Textual Analysis Is Unavailing.

The First Circuit did not directly challenge the textual interpretation of Section 903(1) set forth above, but asserted instead that it proves too much. *See* Pet. App. 38-41a. To accept that argument, according to the First Circuit, would require acceptance of "one of the following two propositions": "[1] Either states that do not authorize their municipalities to file for Chapter 9 relief are similarly 'exempted,' and so not barred by § 903(1) from enacting their own bankruptcy laws," "[2] Or the availability of Chapter 9 relief for state municipalities, regardless of whether a particular state chooses to exercise the option, occupies the field of nonconsensual municipal debt restructuring." Pet. App. 40a. That is a false choice that presents a caricature of petitioners' position.

As an initial matter, to conclude that the categorical exclusion of Puerto Rico from Chapter 9 renders Section 903(1) inapplicable here is by no means to conclude that States that have not authorized their municipalities to seek Chapter 9 relief are also beyond the scope of Section 903(1).

Puerto Rico and the States are differently situated under Chapter 9. As noted above, the States—in contrast to Puerto Rico—always have the *option* of authorizing their municipalities to avail themselves of the benefits of Chapter 9. Insofar as particular States have not yet exercised that option, they always remain free to do so if and when the need arises. Congress thus brought the States within the scope of Chapter 9, and gave them the key to unlock the door. Congress, however, categorically excluded Puerto Rico from the scope of Chapter 9; there is no key and no door.

And precisely because Congress categorically precluded Puerto Rico, unlike the States, from authorizing its municipalities to pursue Chapter 9 relief, Congress itself necessarily *rejected* a policy of municipal-bankruptcy uniformity with respect to Puerto Rico, unlike the States. Thus—although this case does not present the issue—an interpretation of Section 903(1) that allows States covered by Chapter 9 to "enact their own versions of Chapter IX," S. Rep. No. 95-989, at 110 (1978), JA509 (internal quotation omitted), may create an impermissible "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), whereas an interpretation of Section 903(1) that allows Puerto Rico to do so would not.

The First Circuit insisted, however, that Puerto Rico is not "excluded" from Chapter 9; rather, in the court's view, "Puerto Rico is precluded from granting its municipalities the required authorization, and so its municipalities fail to *qualify* for the municipal bankruptcy protection that is available." Pet. App.

41a (emphasis in original). Under this view, "failure to qualify is not the same as direct and express exclusion." *Id.*; *see also id.* at 28a ("If Congress had wanted to alter the applicability of § 903(1) to Puerto Rico, it easily could have written § 101(52) to exclude Puerto Rico laws from the prohibition of § 903(1).") (internal quotation omitted).

That position reveals a fundamental misunderstanding of the role that States (and the term "State") play in the Chapter 9 regime. States themselves are ineligible to restructure their debts under that regime. Instead, the *only* role that a "State" plays in that regime is to authorize its municipalities to seek federal bankruptcy protection under Chapter 9. *See* 11 U.S.C. § 109(c), Pet. App. 274-75a (specifying that a municipality "may be a debtor under chapter 9 of this title if and only if such entity ... is specifically authorized ... to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter ...."). Accordingly, when Congress defined "State" to include Puerto Rico "except for the purpose of defining who may be a debtor under chapter 9 of this title," 11 U.S.C. § 101(52), Pet. App. 273a, it effectively removed Puerto Rico from Chapter 9's reach entirely; the word "State" appears nowhere in Chapter 9 *besides* Section 903, and—as explained above—Section 903 (and hence Section 903(1)) has no application to a jurisdiction, like Puerto Rico, that cannot authorize its municipalities to seek Chapter 9 relief. If Congress had wanted Section 903(1) to bind Puerto Rico, it hardly could have expressed that intent in a more roundabout way than through an exception to a

rule that does not apply to Puerto Rico in a Chapter of the Code that does not apply to Puerto Rico.

The far more natural interpretation is that Chapter 9's reorganization regime *neither* encompasses Puerto Rico *nor* displaces Commonwealth law. *See* Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. at 576 ("[S]ection 903 was only intended to apply to debtors who might actually file under chapter 9."). In other words, Congress created a mechanism for States to allow their municipalities to restructure their debts under *federal* law, and thereafter limited the relief that States could provide those same municipalities under *state* law. Nothing in Section 903(1), or any other provision of the Bankruptcy Code, suggests that Congress sought to displace state restructuring law where federal restructuring law is unavailable.

That is not to say that the general inclusion of Puerto Rico in the definition of "State" in the Bankruptcy Code does no work. That definition, after all, applies not only to Chapter 9, but to the *entire* Code. Indeed, the term "State" occurs no fewer than forty times in chapters of the Code other than Chapter 9. By defining "State" the way it did, Congress ensured that Puerto Rico *would* be considered a "State" throughout the rest of the Code, and thus that Puerto Rico's exclusion from Chapter 9 would not complicate the operation of federal bankruptcy law in Puerto Rico more generally. For example, otherwise-eligible Puerto Rico residents and companies are permitted to file under Chapters 7, 11, and 13 of the Code. *See* 11 U.S.C. § 109(a), (b), (d) & (e), Pet. App. 273-76a (requirements for qualifying as a debtor under Chapters 7, 11, and 13).

It was thus necessary to the proper functioning of the Code for Congress to include Puerto Rico within the definition of "State." By defining "State" as it did, Congress ensured that Puerto Rico would be included in all the chapters of the Code other than Chapter 9. *See* H.R. Rep. No. 96-1195, at 8 (1980), JA532 ("This amendment adds a new paragraph which provides a definition for 'State' primarily to assure that residents and domiciliaries of Puerto Rico can become debtors under title 11.").

The First Circuit's alternative ground for rejecting petitioners' textual argument similarly sets up and knocks down a straw man. *See* Pet. App. 40a (asserting that petitioners contend that "the availability of Chapter 9 relief for state municipalities, regardless of whether a particular state chooses to exercise that option, occupies the field of nonconsensual municipal debt restructuring"). The Commonwealth never made any such field preemption argument at any stage of these proceedings, and that is by no means a necessary implication of its position. Whether Section 903(1) preempts state municipal restructuring laws by States that have not authorized their municipalities to seek Chapter 9 relief has nothing to do with "field" preemption of any sort; rather, it simply involves the preemptive scope (and constitutionality) of Section 903(1) itself. The First Circuit's "field" preemption argument simply assumes that petitioners cannot draw a line between States within the scope of Chapter 9, on the one hand, and Puerto Rico, on the other, which—as noted above—they can.

b. The First Circuit's Reliance On The History Of Section 903(1) Is Unavailing.

The First Circuit's reliance on the history of Section 903(1) is similarly misplaced. The court placed great weight on the fact that Puerto Rico, like other territories and possessions, was included within the Bankruptcy Code's definition of "State" from 1938 until the Code's overhaul in 1978. Pet. App. 4a, 12-16a & n.12, 26a (citing Act of June 22, 1938, 75th Cong., 3d Sess., 52 Stat. 840, 842 (1938)), JA554 (defining "State" in relevant part to "include the Territories and possessions to which this Act is or may hereafter be applicable, Alaska, and the District of Columbia"). Because Puerto Rico was within the scope of Chapter 9 at that time, and hence subject to Section 903(1) upon the enactment of that provision in 1946, the First Circuit declared that Puerto Rico should still be deemed to be within the scope of Chapter 9, and hence subject to Section 903(1). That is so, the court declared, because "'[w]e ... will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" Pet. App. 4a, 23-24a (quoting *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998)); *see also id.* at 4a, 26-27a ("'Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move.'") (quoting *Kellogg Brown & Root Servs. Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015)); *id.* at 22a, 24a ("'When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'") (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992)).

But that line of reasoning in no way supports the First Circuit's conclusion. The 1984 amendment represented a dramatic *departure* from past practice—for the first time, Congress categorically barred certain jurisdictions (Puerto Rico and the District of Columbia) from authorizing their public agencies and instrumentalities to seek relief under Chapter 9. In light of that departure from past practice, there is no basis to assume that Congress meant to continue "business as usual" with respect to the applicability of Section 903(1). Because Congress unquestionably "erode[d] past bankruptcy practice," *Cohen*, 523 U.S. at 221 (internal quotation omitted), by stripping Puerto Rico of the *benefits* of Chapter 9, there is no reason to suppose that Congress did not similarly erode past bankruptcy practice by freeing Puerto Rico from the *burdens* of Chapter 9. Past practice, after all, had always involved a perfect symmetry between those benefits and those burdens.

If anything, the principle that courts should be "'reluctant to accept arguments that would interpret the Code ... to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history,'" Pet. App. 28a (quoting *Dewsnup*, 502 U.S. at 419), cuts in *petitioners'* favor. It is implausible to think that Congress would have taken the momentous step of altering the Code to foreclose Puerto Rico from access to *any* legal mechanism for restructuring its municipal debt without any comment or discussion.

The legislative history likewise cannot bear the weight the First Circuit placed on it. To the contrary, as that court acknowledged, "[t]he legislative history is *silent* as to the reason for the

exception set forth in the 1984 amendment." Pet. App. 28a (emphasis added). There is *not one word* in the legislative history of the 1984 amendment—not in a committee report, not in a floor statement, nowhere—to suggest any reason why Congress foreclosed Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. The *only* relevant testimony came from Professor Frank Kennedy, one of the leading bankruptcy scholars of the day, who stated that "I do not understand why the municipal corporations of Puerto Rico are denied by the proposed definition of 'State' of the right to seek relief under Chapter 9." *Bankruptcy Improvements Act, Hearing on S. 333 & S. 445, before the Senate Comm. on the Judiciary*, 98th Cong., 325-26 (Apr. 6, 1983), JA538.

Thus, nothing in the legislative history remotely supports the First Circuit's conclusion that Congress intended the 1984 amendment to deny Puerto Rico access not only to Chapter 9 but to *any* legal mechanism to restructure its municipal debts. *See* Stephen Mihm, *Congress Goofed. Puerto Rico Pays.*, Bloomberg View, Dec. 3, 2015 ("Why the change? No one debated or discussed it in Congress. No one seems to have noticed the provision, or if they did, bothered to question why it had been inserted. Was it a rogue committee staffer? A clerical error? The historical record is silent on these questions."), *available at* http://tinyurl.com/jbmu5ex (last visited Jan. 19, 2016); *see also id.* (noting that "Kenneth Klee, who served as a bankruptcy consultant to the House Judiciary Committee from 1977 to 1982, recently testified that 'there is no legislative history explaining the purpose or rationale' for the language").

The First Circuit sought to fill the void by discussing the history of *other* legislation—namely, the legislation that created the precursor to Section 903(1) and ultimately Section 903(1) itself. *See* Pet. App. 24-28a. But that legislative history—all of which *long predates* the 1984 amendment at issue here—proves nothing. The legislative history of the precursor to Section 903(1), which was added to the U.S. Code in 1946, in the wake of *Faitoute*, shows at most that Congress wanted municipal bankruptcy law to be uniform:

> State adjustment acts have been held to be valid, but a bankruptcy law under which bondholders of a municipality are required to surrender or cancel their obligations should be uniform throughout the 48 States, as the bonds of almost every municipality are widely held. Only under a Federal law should a creditor be forced to accept such an adjustment without his consent.

H.R. Rep. No. 79-2246, at 4 (1946), JA411. In a similar vein, when Congress retained and recodified that provision as part of an overhaul of the Bankruptcy Code in 1978, it noted that "[d]eletion of the provision would permit all States to enact their own versions of Chapter IX, ... which would frustrate the constitutional mandate of uniform bankruptcy laws." S. Rep. No. 95-989, at 110 (1978), JA509 (internal quotation omitted).

But none of that legislative history says anything about what happens where, as here, *Congress itself* departs from the uniformity of federal bankruptcy law by categorically foreclosing a jurisdiction, like

Puerto Rico, from authorizing its municipalities to seek relief under Chapter 9. To the contrary, the legislative history of Section 903(1) *presupposes* the availability of a federal mechanism for restructuring municipal debts. *See Hearings on H.R. 4307*, 79th Cong. 16 (1946), JA445 (statement of Millard Parkhurst) (precursor to Section 903(1) intended to prevent States from "hav[ing] their bankruptcy laws running right along at the same time as [Chapter 9]"). And that is perfectly understandable because, at the time the legislative history was written, no jurisdiction was excluded from Chapter 9. Certainly, nothing in the legislative history remotely suggests that Congress intended to create a no man's land where a public utility cannot restructure its debts under *either* federal *or* state law.

c. The First Circuit's Reliance On Conflict Preemption Is Unavailing.

Finally, the First Circuit erred by asserting that the Recovery Act is preempted on "conflict preemption" grounds separate and apart from the text of Section 903(1). *See* Pet. App. 41-43a. In particular, the court held, "[c]onflict preemption applies here because the Recovery Act frustrates Congress's undeniable purpose in enacting § 903(1)." Pet. App. 42a. The court based that holding on the premise that, in light of the legislative history cited above, "Congress quite plainly wanted a single federal law to be the sole source of authority if municipal bondholders were to have their rights altered without their consent." *Id.*; *see also* Pet. App. 3a ("§ 903(1) ... ensures the uniformity of federal bankruptcy laws by prohibiting state municipal debt

restructuring laws that bind creditors without their consent.").

But, for the reasons described above, that argument begs the question. The legislative history on which the court relied was not the history of the 1984 amendment at issue here—because there is none—but rather the history of Section 903(1) *before* Puerto Rico (or any other jurisdiction) was categorically foreclosed from authorizing its municipalities to seek relief under Chapter 9. Accordingly, that history sheds no light on the question presented here, and certainly does not establish that the Recovery Act conflicts with Chapter 9 or Section 903(1) in any way.

To the contrary, the Recovery Act represents Puerto Rico's attempt to fill the gap left by the inapplicability of Chapter 9 to the Commonwealth's public corporations, agencies, and instrumentalities. *See* Lubben, *Puerto Rico & The Bankruptcy Clause*, 88 Am. Bankr. L.J. at 567 ("Puerto Rico's new Recovery Act is addressed to a class of debtors who are expressly excluded from chapter 9 of the Bankruptcy Code by virtue of the exclusion of Puerto Rico from the definition of State 'for the purpose of defining who may be a debtor under chapter 9.' As such, there is no way for the Recovery Act to conflict with chapter 9 in violation of Congress' powers under the Bankruptcy Clause."); *id.* at 577 ("[I]t is emphatically possible to apply the Recovery Act and the Bankruptcy Code simultaneously, because the Bankruptcy Code has nothing to say about Puerto

Rican municipal corporations. The two laws are mutually exclusive.").[4]

* * *

Ultimately, respondents ask this Court to hold that Congress—*sub silentio* and through an amendment to a statutory definition—foreclosed Puerto Rico from access to *any* legal mechanism for restructuring the debts of its public utilities, which provide basic and essential services to its citizens.

This Court should decline that invitation. Respondents' argument not only ignores the relevant presumptions, but also turns Chapter 9 on its head. Section 903(1) is part and parcel of Chapter 9: on the one hand, Congress created a federal mechanism for States to restructure their municipal debts while, on

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[4] In addition, the First Circuit's conflict preemption argument would create untoward consequences for territories not even arguably within the scope of Chapter 9. As noted above, Congress amended the Bankruptcy Code in 1984 to define "State" to include Puerto Rico and the District of Columbia, "except for the purpose of defining who may be a debtor under chapter 9 of this title." 11 U.S.C. § 101(52), Pet. App. 273a. By limiting that definition to those two jurisdictions, Congress apparently excluded territories and possessions (*i.e.*, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands) from the definition of "State" under the Code. *"Expressio unius est exclusio alterius." Leatherman v. Tarrant Cty. Narcotics & Intell. Coordination Unit*, 507 U.S. 163, 168 (1993). Accordingly, those other jurisdictions are not even arguably within the scope of Chapter 9 or, for that matter, Section 903(1). Although the First Circuit acknowledged that those other jurisdictions "are not expressly included for *any* purpose" in the Code, Pet. App. 16a n.12 (emphasis added), its conflict preemption analysis would relegate them to the same "no man's land" as Puerto Rico and the District of Columbia.

the other, Congress limited their ability to restructure those debts outside that mechanism. It makes no sense to read a limitation on Chapter 9 to apply to a jurisdiction, like Puerto Rico, that is outside the scope of that Chapter in the first place.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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